

**The Mead Corporation, Fine Paper Division and
United Steelworkers of America, for itself and
on behalf of Local 12943.** Case 10-CA-26266

July 31, 1995

DECISION AND ORDER

BY MEMBERS STEPHENS, COHEN, AND
TRUESDALE

Upon a charge filed by the Union, United Steelworkers of America, for itself and on behalf of Local 12943, on September 28, 1992, the General Counsel of the National Labor Relations Board issued a complaint on February 25, 1993, against the Company, the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act. On March 16, 1993, the Respondent filed an answer admitting in part and denying in part the allegations of the complaint, and submitting affirmative defenses.

On April 16, 1993, the General Counsel filed a Motion for Summary Judgment. On April 20, 1993, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On May 4, 1993 the Respondent filed a response to the Notice to Show Cause. The Charging Party filed a statement in support of the Motion for Summary Judgment.

Ruling on Motion for Summary Judgment

In its answer and response to the Notice to Show Cause, the Respondent admitted in part and denied in part the allegations of the complaint. In light of the Respondent's admission to all factual allegations in the complaint, there is no material issue of fact that would require a hearing. Further, for the reasons set forth below, we find, on the basis of the undisputed record evidence, that the Respondent has violated the Act as alleged. Accordingly, we are granting the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, an Ohio corporation, is engaged in the manufacture and distribution of paper products at its facility in Kingsport, Tennessee, where it annually purchased and received goods in excess of \$50,000 directly from points outside the State of Tennessee.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All production and maintenance employees employed at the Respondent's Kingsport, Tennessee plant, including inspectors, sample carriers, sample room employees, press operators and helpers in the Sales Service Department, plant janitors, steam, electric, water plant employees, woodyard employees, watchmen, store room employees, laboratory employees (except special technicians and engineers), instrument repair and landfill employees, but excluding passenger car chauffeurs, office janitors, hospital, engineering and technical employees, laboratory special technicians and engineers, wood procurement department employees, sales department employees (except for inspectors, sample carriers, press operators and helpers), administrative and clerical, and supervisors as defined in the Act.

At all times material, the Union, by virtue of Section 9(a) of the Act, has been and is the designated collective-bargaining representative of the employees in the appropriate unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and has been recognized as the representative by the Respondent. This recognition has been embodied in the collective-bargaining agreement which is effective by its terms for the period of January 24, 1991, to January 25, 1994.

At all times material, the Respondent, pursuant to the collective-bargaining agreement, has maintained "the Mead Retirement Plan." In this regard, article XXV, section 1 of the agreement provides:

The Company agrees to maintain, during the term of this Agreement, a retirement plan as agreed upon with the Union. The terms and conditions of the agreed upon retirement plan are set forth in the document entitled the Mead Retirement Plan for Hourly Employees of the Kingsport Mill

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On or about August 13, 1992, the Respondent, by letter, invited the Union to meet and negotiate "selected improvements in certain wage rates and benefits." During the period August 25 through September 17, 1992, pursuant to the Respondent's letter, the Respondent and the Union met and bargained over certain items, including, inter alia, a "voluntary retirement incentive to Maintenance Department Craft employees"

covered under the collective-bargaining agreement. No agreement was reached on this subject.

On or about September 17, 1992, the Respondent, without the Union's agreement or consent, implemented its retirement incentive program for maintenance department craft employees.

The General Counsel, in support of his Motion for Summary Judgment, contends that article XXVIII of the collective-bargaining agreement, commonly referred to as a "zipper clause," prohibits the Respondent from unilaterally implementing the "retirement incentive program" without the consent of the Union. Article XXVIII provides as follows:

This Agreement is complete in writing and excludes all matters from further negotiation for the duration of this Agreement, whether or not previously mentioned, and except as specifically provided to the contrary herein. Further, this Agreement shall not be amended, changed, altered, or qualified except by an instrument in writing duly signed by the parties signatory hereto.

The General Counsel concedes that a "retirement incentive program" was not a term of the parties' agreement. However, the General Counsel argues, the contract's zipper clause forecloses "all matters" from bargaining and change during the life of the contract. Therefore the Respondent's unilateral implementation of the "retirement incentive program," regardless of whether impasse in bargaining has been reached, violated the provisions and requirements of Section 8(d) of the Act, and thereby violated Section 8(a)(5) and (1) of the Act.

In its answer to the General Counsel's motion, the Respondent admits the factual allegations of the complaint but denies the legal conclusions alleged in paragraphs 13 and 14. The Respondent further contends that, as the "retirement incentive program" was not covered under the existing collective-bargaining agreement, the Respondent was free to implement the program after bargaining to impasse with the Union on the subject.

The Respondent also contends that it was not precluded from implementing its proposal by the "zipper clause" of the contract, because the clause is ambiguous, relying on *Michigan Bell Telephone Co.*, 306 NLRB 281 (1992). It argues that because the clause excludes "all matters from further negotiations for the duration of the agreement" (emphasis added), the clause refers only to matters that were previously negotiated. Therefore, only matters that were previously negotiated are precluded from further bargaining and from change.

In addition, the Respondent contends that the Union waived any right it might have had under the zipper clause when it negotiated concerning the retirement in-

centive program and bargained to impasse on the subject.

In support of the General Counsel's Motion for Summary Judgment, the Charging Party argues that the Respondent, by offering the retirement incentives, modified the agreed-on terms of the retirement plan and article XXV, section 1, of the collective-bargaining agreement. The Charging Party also argues that, because of the "zipper clause" of article XXVIII of the collective-bargaining agreement, the Respondent could not implement the retirement program without the Union's consent even if the Respondent did not modify the agreed-on retirement plan. Finally, the Charging Party contends that an appropriate remedy would be to require the Respondent to make the same monetary offer to all bargaining unit employees whose age and service qualifies them for retirement.

We agree with the General Counsel that the "zipper clause" unambiguously precludes the Respondent from implementing any new terms or conditions of employment, in the absence of assent by the Union. Bargaining to impasse over the subject was not sufficient to justify the unilateral implementation.

Section 8(d) of the Act provides that a party which seeks to modify a term or condition of employment "contained in" a current collective-bargaining agreement must obtain the consent of the other party before implementing the change. If the condition sought to be changed is not "contained in" the agreement, the obligation is only the general one of bargaining in good faith to impasse over the subject before instituting the proposed change. *Milwaukee Spring Division*, 268 NLRB 601 (1984), *affd.* 765 F.2d 175 (D.C. Cir. 1985).

The contract here does not contain a retirement incentive program. Thus, absent a waiver, we assume *arguendo* that Respondent would be free to implement such a program after bargaining to impasse.¹ We believe that the "zipper clause" is such a waiver. The clause excludes "all matters" from further negotiations, irrespective of whether they were previously mentioned. Since these matters are not subject to bargaining, they obviously are not subject to the general rule permitting change after a bargaining impasse. In sum, such matters cannot be bargained and they cannot be changed, absent consent.² This point is reinforced by the last sentence which forecloses any amendments or changes except on consent.

The Respondent contends that the zipper clause is ambiguous and does not constitute a clear and unmistakable waiver. It contends that the presence of the word "further" in the zipper clause means that the

¹ The Charging Party contends that the program is a modification of art. XXV. The General Counsel, however, does not make this contention, and we find it unnecessary to reach it.

² *GTE Automatic Electric*, 261 NLRB 1491 (1982).

parties intended to preclude bargaining only as to items that had been previously negotiated. As there had been no bargaining about the retirement incentive program, Respondent argues, there was no waiver of the right to negotiate. Further, after bargaining to impasse, it was free to implement its proposal.

In *Michigan Bell*, supra, relied on by the Respondent, the zipper clause stated:

This Agreement is agreed upon in final settlement of all demands and proposals made by either party during recent negotiations, and the parties intend *thereby* to finally conclude contract bargaining throughout its duration. [Emphasis added.]

The Board there found no clear and unmistakable waiver of the parties right to bargain over mandatory subjects not mentioned in the contract or in negotiations preceding the contract. Rather, it found that the term “thereby” arguably referred to the preceding phrase “all demands and proposals made . . . during recent negotiations” and waived bargaining only as to those demands and proposals made during contract negotiations.³

We find no ambiguity in the zipper clause here, and we find none in the presence of the term “further,” as asserted by the Respondent. Rather, we find that the clause waives bargaining as to “all matters” “whether or not previously mentioned.” The presence of these words precludes any reasonable interpretation that the clause waived bargaining only as to matters that had previously been the subject of negotiations leading to the contract. The phrase “further negotiation” means only that there will be no further negotiations concerning any matter. We thus find that the clause constitutes a clear and unmistakable waiver of the right to bargain over mandatory subjects during the term of the contract. Because of this waiver, the Respondent was not free to implement any new terms and condition of employment after bargaining, without the assent of the Union.

We also find no merit in the Respondent’s contention that the Union waived any rights it might have enjoyed under the zipper clause because it did engage in bargaining to impasse over the retirement incentive program. Assuming arguendo that the Union bargained to impasse, it neither expressed nor implied anything that would indicate that it was consenting to a modification which, as discussed above, was foreclosed by the contract.⁴

For the foregoing reasons, we find that the Respondent violated Section 8(a)(5) and (1) of the Act by its

implementing its retirement incentive program without the consent of the Union.

CONCLUSION OF LAW

By the unilateral implementation of its retirement incentive program for certain maintenance department craft employees, the Respondent has refused to bargain with the Union over mandatory subjects of bargaining within the meaning of Section 8(d) and in violation of Section 8(a)(5) and (1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.⁵

ORDER

The National Labor Relations Board orders that the Respondent, the Mead Corporation, Fine Paper Division, Kingsport, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with United Steelworkers of America and its Local 12943, as the exclusive collective-bargaining representative of its production and maintenance employees employed at its Kingsport, Tennessee facility.

(b) Unilaterally changing terms and conditions of employment of bargaining unit employees by implementing the retirement incentive program for maintenance department craft employees without the Union’s consent.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind, on request of the Union, the retirement incentive program for maintenance department craft employees.

(b) Post at the Respondent’s Kingsport, Tennessee facility copies of the attached notice marked “Appendix.”⁶ Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous

³The Board distinguished the clause in *Michigan Bell* from the clear waivers found in the zipper clauses in *GTE Automatic Electric*, supra, and *Jones Dairy Farm*, 295 NLRB 113 (1989).

⁴*Standard Fittings Co. v. NLRB*, 845 F.2d 1311 (5th Cir. 1988).

⁵We decline to grant the Charging Party’s requested remedy. In light of the conclusion that the change was forbidden by the contract, it would be inappropriate to grant a remedy which extends the change to additional employees.

⁶If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

MEMBER STEPHENS, dissenting.

Contrary to my colleagues, I find ambiguity in the language of the zipper clause, and I would remand this case for a hearing to allow the introduction of evidence to clarify this ambiguity. Accordingly, I would deny the General Counsel's Motion for Summary Judgment.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain in good faith with United Steelworkers of America, and its Local 12943, as the exclusive representative of the production and maintenance employees employed at our Kingsport, Tennessee facility.

WE WILL NOT unilaterally change the terms and conditions of employment of bargaining unit employees by implementing the retirement incentive program for maintenance department craft employees without the Union's consent.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind, on request of the Union, the retirement incentive program for maintenance department craft employees.

THE MEAD CORPORATION